TEL (415) 744-6577
FAX (415) 744-6569

DATE: January 12, 1996
CASE NUMBER 95-STA-43

In the Matter of

GALE COOK,
COMPLAINANT,

v.

GUARDIAN LUBRICANTS, INC.,
RESPONDENT.

Appearances

Gale W. Cook, Pro Se
P.O. Box 88432
Tukwila, Washington 98055
For the Complainant

Jeff and Carol Guddat, Pro Se
P.O. Box 1044
Renton, Washington 98057
For the Respondent

## RECOMMENDED DECISION AND ORDER

This proceeding arises under the provisions of Section 405 of the Surface Transportation Assistance Act, 49 U.S.C. §31105 (hereinafter referred to as "the Act" or "the STAA").[1] A formal hearing was held in Seattle, Washington, on October 17, 1995. The Complainant appeared pro se, and Guardian Lubricants, Inc., was represented by Jeff Guddat, who at that time was the company's general manager. Tr. at 64-65. Testimony was received from both of these individuals and the following exhibits were admitted into evidence: Complainant's Exhibits ("CX") 1 and 2; Respondent's Exhibits ("RX") 1 and 2; and Administrative Law Judge Exhibit ("ALJX") 1. As well, official notice was taken of the Federal highway safety regulations set forth at 49 C.F.R. Parts 383, 387, 390-99.

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[1] The STAA was enacted for the purpose of promoting safety on the nation's highways, and, among other things, prohibits any person from discharging or otherwise discriminating against an employee in retaliation for having engaged in certain safety-related activities. The Department of Labor regulations implementing the STAA are set forth at 29 C.F.R. §1978.

During the October 17 hearing it was represented by Jeff Guddat that he has no personal knowledge of the facts in dispute and that the only person at Guardian Lubricants who does have such knowledge is his father, Carol Guddat. He further indicated that Carol Guddat had been on an out-of-state vacation when the original hearing notice was issued and had not yet returned to Seattle. Tr. at 68-69. Accordingly, after the completion of the hearing the record was re-opened and a supplemental hearing was scheduled to receive the testimony of Carol Guddat, as well as any rebuttal evidence that the Complainant might offer.[2] During the supplemental hearing, which was held in Seattle on December 4, 1995, both Carol Guddat and the Complainant testified. In addition, the Respondent introduced into evidence a copy of a magazine article, which has been marked as Respondent's Exhibit 3.

## BACKGROUND

The Respondent, Guardian Lubricants, Inc. ("Guardian"), is a small family business that is operated by members of the Guddat family and one non-family employee. Tr. at 65, 93. Among other things, Guardian provides trucks (i.e., truck tractors) with drivers to various common carriers that are engaged in hauling containers and empty chassis between various points around the Port of Seattle. Tr. at 15, 64, 94. According to Carol Guddat, Guardian currently owns a total of six trucks, only three of which are in use. Tr. at 121.

The Complainant, Gale Cook, began working as a driver for Guardian on March 13, 1994. RX 2. Under the written agreement between the Complainant and Guardian, the Complainant was assigned a 1977 Freightline tractor belonging to Guardian and promised that he would be paid a percentage of the revenues on each shipment he hauled at such time as the revenues for the shipments were received by Guardian. Id. The agreement also characterized the Complainant as "an independent contractor" and expressly stated that from time to time either Guardian or other companies might provide him shipments. Id. However, the agreement also specified that "[i]t shall be the duty and responsibility of the contractor [i.e., the Complainant] to procure and schedule loads to keep the truck as busy as possible ...." Id. According to the Complainant, after signing the contract and taking possession of the truck, he reported several safety-related problems with the truck to Carol Guddat which were eventually corrected. Tr. at 49-50, 165.

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[2] On November 4, 1995, the Complainant objected to having such a supplemental hearing and sent a copy of his letter of objection to the Federal Bureau of Investigation. The Complainant also reiterated this objection at the outset of the supplemental hearing.

As contemplated in the Complainant's contract with Guardian, around the middle of March, 1994 the Complainant began hauling shipments tendered by four different companies which had on-going arrangements with Guardian to have their shipments transported by Guardian-owned trucks. Tr. at 16-17, 112-13. Initially, however, most of the shipments were offered by a company known as Conex, which routinely needed to have containers hauled to various Seattle-area piers from a local Burlington Northern railroad yard and from Conex's own Seattle-area terminal. Tr. at 18, 30-31. According to the Complainant, during the summer of 1994 he complained "a couple of times" to Carol Guddat that some of the shipments he was being given by Conex were overweight, i.e., exceeded the 80,000-pound Federal maximum by 5,000 to 10,000 pounds. Tr. at 24-25, 27, 36. It is the Complainant's recollection that Mr. Guddat was not particularly concerned about the complaints and simply replied that the Complainant should "'turn them down, haul 'em, or quit.'" Tr. at 25. The Complainant further testified that Mr. Guddat did not object when the Complainant told him that he preferred to pick up the Conex shipments originating at the Burlington Northern railroad yard because most of the overweight Conex shipments were coming from Conex's Seattle-area terminal. Tr. at 32-33. During the supplemental hearing Carol Guddat agreed that the Complainant had complained to him about receiving overweight containers from Conex and represented that he told the Complainant that under his contract he had to decide for himself whether to haul containers that he considered to be overweight. Tr. at 101-02. In addition, Mr. Guddat acknowledged that the Complainant had also made safety-related complaints to him about the number of hours Conex expected him to work and indicated that, in response, he told the Complainant that he should make his own decisions about the number of hours he drove. Tr. at 105-06.

According to the Complainant, on October 14, 1994, he picked up a "couple of" refrigerated containers at the Conex terminal that were found to be overweight when later weighed at the waterfront in Seattle. Tr. at 34-36. The following morning, he recalls, he returned to the Conex terminal, at which time the general manager of Conex, Tony Stafford, asked him why another refrigerated container that was still at the terminal had not yet been delivered. Tr. at 34, 36-37. In response, the Complainant testified, he told Stafford that the containers he delivered the prior day had been overweight and asserted that the remaining container was also overweight.[3] Tr. at 37. Stafford then allegedly told the Complainant to deliver the container anyway, and

[3] In this regard, the Complainant concedes that it is ordinarily not possible to know if a container is overweight until it is weighed at the point of delivery, but contends that in his experience approximately 75 percent of the containers he picked up at the Conex terminal turned out to be overweight. Tr. at 27, 32.

the Complainant began to walk away so that he could call Carol Guddat for advice. Id. As he was walking away, the Complainant asserts, Stafford said, "'You're fired. You're done, Gale.'" Tr. at 37-38. Thereafter, the Complainant testified, he left Guardian's truck in a lot on Harbor Island where it was usually parked, and waited about five days before notifying Carol Guddat. Tr. at 39-40. According to the Complainant, he did not contact Carol Guddat any sooner because he was "shocked" as a result of being "fired" by Stafford. Tr. at 157.

Carol Guddat testified that he first became aware of Conex's refusal to do business with the Complainant when he picked up some papers from Conex about five or six days later, and admits that at that time Mr. Stafford told him that the decision was based in part on the Complainant's refusal to haul allegedly overweight containers from the Conex terminal. Tr. at 106-07, 145. Mr. Guddat also testified, however, that Mr. Stafford had asserted that on at least one occasion the Complainant had failed to appear for four or five days in a row and that the Complainant had been undependable in various other ways.[4] Tr. at 108-09. Mr. Guddat further testified that he was "dismayed" by the fact that Guardian's truck had been sitting idle for four or five days before he even learned of Conex's refusal to give any more shipments to the Complainant. Tr. at 113. In this regard, he explained that Guardian incurs about $30 in out-of-pocket expenses for each of its trucks every day and therefore needs to keep the trucks in service as much as possible. Tr. at 110. Mr. Guddat also noted that the Complainant had repeatedly refused to drive substitute trucks on the days when Guardian was servicing his assigned truck, and that, as a result, he came to believe that the Complainant wanted to work only some of the time and "didn't need to work." Tr. at 111, 125. The Complainant acknowledges that he refused to drive substitute trucks but asserts that his agreement with Guardian didn't contemplate that he would drive any vehicles other than the one assigned to him. Tr. at 163-64.

According to the Complainant, when he did inform Carol Guddat about what had happened at Conex, Mr. Guddat suggested that he start hauling shipments for another Guardian client, Seattle Freight. Tr. at 40, 151-52. Carol Guddat concurs with this representation, but points out that it was the Complainant who made the first contact with Seattle Freight about such an arrangement. Tr. at 112, 126, 146. As a result, during the third week of October the Complainant began hauling shipments for Seattle Freight. Tr. at 40-41. However, the Complainant asserts, the shipments he received from Seattle Freight generally consisted of unloaded chassis or empty containers and therefore did not generate as much income as the loaded containers he had been hauling for

[4] The Complainant, however, denies missing any work at Conex prior to being "fired" by Mr. Stafford. Tr. at 81, 163, 167-68.

Conex. Tr. at 42. The Complainant does not recall if any of the shipments he was given by Seattle Freight were overweight or otherwise in violation of any laws. Tr. at 43.

There are several material conflicts in the evidence concerning the events that occurred next.

According to the Complainant, on November 10, 1994 he called the dispatcher at Seattle Freight and told him that he was sick and would not be picking up shipments that day. Tr. at 43-44, 78. As well, the Complainant also thinks he told the dispatcher that he would not be back until the following Monday. Tr. at 44. It is the Complainant's recollection that when he went to pick up the truck the following Monday morning (November 14), the truck was not in the lot on Harbor Island where he had parked it, and that he therefore called Carol Guddat on the telephone. Tr. at 20, 45, 79, 148. The Complainant testified that during the telephone conversation Mr. Guddat indicated that he had taken the truck and told the Complainant to return the truck's keys and cellular phone. Tr. at 20, 45-46. As well, the Complainant testified, Mr. Guddat complained that the truck hadn't been utilized over the weekend and explained that the truck had to be in use "every day" because it was costing Guardian money every day. Tr. at 46, 48. The Complainant also testified that he believes he told Mr. Guddat that he had been sick, but that Mr. Guddat did not respond to that representation. Tr. at 48-49. The Complainant further testified that he "believe[s]" that this conversation occurred on Monday, November 14, but acknowledged that it may have taken place on Tuesday, November 15. Tr. at 169.

During cross-examination, the Complainant acknowledged that during the first part of November he had not received the payments he had expected for the work he had done for Seattle Freight and had called Carol Guddat to complain about the delays. Tr. at 73-74. According to the Complainant, he was told that Seattle Freight was slow in paying Guardian for those shipments, but didn't fully understand what Mr. Guddat said. Tr. at 74-75. During the supplemental hearing, the Complainant further testified that he believes this conversation occurred about a week before he discovered that Carol Guddat had taken back the Guardian truck. Tr. at 156-57. The Complainant also indicated that he expected to be paid each Friday, even if Seattle Freight had not yet paid Guardian, and that the Friday he told Seattle Freight he was sick was "maybe" the second Friday he had failed to receive an expected payment for such work. Tr. at 75-77, 81-84, 157. The Complainant acknowledges that during his conversation with Carol Guddat he remarked that he couldn't be expected to work without pay. Tr. at 160-62, 167. However, he denies threatening to quit driving if not paid or being told by Mr. Guddat to either drive or turn in the truck keys. Tr. at 76-78, 162, 167-70. The Complainant also denies that any relationship exists between the delay in receiving

his pay and his failure to operate the truck after November 9 or 10. Tr. at 77-78.

Carol Guddat's version of the November events differs in a number of details. According to Mr. Guddat, on Thursday, November 10, the Complainant spoke with him on the telephone and asked that his paycheck be sent to him in the mail. Tr. at 116. Thereafter, Mr. Guddat testified, he received two telephone calls from the Complainant. During the first call, which was on the following Saturday, the Complainant allegedly complained that he had not yet received the check. Tr. at 116. During the second call, which Mr. Guddat recalls was placed to his home at 7:30 a.m. on Monday, November 14, the Complainant again complained that he had not yet received the check and said that he wouldn't drive until he received it. Tr. at 116-17, 130. In response, Mr. Guddat testified, he told the Complainant to either drive the truck or return the keys. Tr. at 117. On the morning of next day, Mr. Guddat testified, he observed that Guardian's truck was parked at the location on Harbor Island where it was customarily stored and therefore concluded that the Complainant was refusing to work. Tr. at 117, 129. As a result, Mr. Guddat asserted, he moved the truck back to Guardian's office. Tr. at 117. According to Mr. Guddat, he did not receive any telephone calls from the Complainant after removing the truck from Harbor Island. Tr. at 122. He did recall, however, that at some later time the Complainant visited Guardian's office and discussed with him the possibility of purchasing the truck from Guardian. Tr. at 123. Mr. Guddat also testified that not long after he removed the truck from Harbor Island, the Complainant mailed the truck's keys and cellular phone to Guardian's office. Tr. at 159, 180, 182-83.

According to Mr. Guddat, the Complainant's safety-related complaints played no part in his decision to retrieve the truck from Harbor Island. Tr. at 191, 193. As well, he represents that he was simply getting tired of the Complainant's refusals to work and indicated that, in his view, the Complainant's refusal to continue to driving was tantamount to voluntarily quitting his job. Tr. at 125-26. He also represents that if he had not found Guardian's truck parked on Harbor Island on November 15, the Complainant might still be driving for Guardian. Tr. at 129. Mr. Guddat concedes that the Complainant never explicitly said that he was quitting and that the payments for the Complainant's work for Seattle Freight had been delayed. Tr. at 121, 130, 171-72. He explained, however, that the delay was due to a normal lag in Seattle Freight's payments to Guardian. Tr. at 171-72. Mr. Guddat also represents that he was subsequently unable to find another driver for the truck and that he elected not to re-license the truck at the end of 1994. Tr. at 114, 120. He also testified that the truck was sold in the summer of 1995. Tr. at 120.

The Complainant did not file a complaint with the Department of Labor concerning his termination by Conex or Guardian until May

6, 1995. ALJX 1. According to the Complainant, he did not file the complaint earlier because he was unaware of his rights under the STAA until he received a May 3, 1995 letter from a Federal Highway Administration ("FHA") official in response to an April 27, 1995 letter he sent to the FHA concerning overweight vehicles.[5] Tr. at 58, 60. After being discharged by Guardian, the Complainant received unemployment benefits for about a month and then worked for another trucking company for about two months. Tr. at 61. Sometime after that job ended, he began working for Kidimula International, Inc., where he also claims that he was fired due to a refusal to haul overweight containers.[6]

ANALYSIS

Although the Complainant's written agreement with Guardian described the Complainant as an independent contractor, it is clear that the Complainant was an "employee" as that term is defined in the STAA, i.e., that the Complainant was a driver of a commercial motor vehicle whose work duties directly affected commercial motor vehicle safety. See 49 U.S.C. §31101(2)(explicitly defining the term "employee" to include independent contractors who personally operate commercial motor vehicles). Likewise, it is also clear that Guardian is a "person" as that term is defined in the Act. Hence, the only issue in dispute is whether the Complainant was discharged or otherwise discriminated against because he made safety-related complaints or refused to drive for safety-related reasons. See 49 U.S.C. §31105.

The legal standard for determining if there has been a violation of the STAA is well established. In particular, an employee must initially present a prima facie case consisting of a showing that he or she engaged in protected conduct, that the employer was aware of that conduct, and that the employer took some adverse action against the employee. In addition, as part of the prima facie case the employee must present evidence sufficient to

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[5] In this regard, it is noted that although the Complainant's initial complaint to the Department of Labor also indirectly accused Conex of violating the STAA, no complaint was filed with any government agency (including the FHA) until more than 180 days after October 14, 1994--the day he was "fired" by Conex. Accordingly, any claim against Conex is barred by the 180-day limitations period set forth at 49 U.S.C. §31105(b). However, since the complaint was mailed to the Department of Labor within 180 days after the termination of the Complainant's employment by Guardian, the claim against Guardian is timely.

[6] A hearing concerning the Complainant's STAA claim against Kidimula International was held in Seattle on October 16, 1995, and a Recommended Decision and Order rejecting that claim was issued on November 21, 1995.

raise the inference that his or her protected activity was the likely reason for the adverse action. If the employee establishes a prima facie case, the employer then has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, non-discriminatory reasons. At this point, however, the employer bears only a burden of producing evidence, and the ultimate burden of persuasion of the existence of intentional discrimination rests with the employee. If the employer successfully rebuts the employee's prima facie case, the employee still has the opportunity to demonstrate that the proferred reason was not the true reason for the employment decision. This may be accomplished either directly, by persuading the factfinder that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proferred explanation is unworthy of credence. In either case, the factfinder may then conclude that the employer's proferred reason is a pretext and rule that the employee has proved actionable retaliation for the protected activity. Conversely, the trier of fact may conclude that the employer was not motivated in whole or in part by the employee's protected activity and rule that the employee has failed to establish his or her case by a preponderance of the evidence. Finally, the factfinder may decide that the employer was motivated by both prohibited and legitimate reasons, i.e., that the employer had "dual" or "mixed" motives. In such a case, the burden of proof shifts to the employer to show by a preponderance of the evidence that it would have taken the same action with respect to the employee, even in the absence of the employee's protected conduct. See Darty v. Zack Company, 80-ERA-2 (April 25, 1983); McGavock v. Elbar, Inc., 86-STA-5 (July 9, 1986); Nix v. Nehi-RC Bottling Co., Inc, 84-STA-1 (July 13, 1984). See also Roadway Express, Inc. v. Brock, 830 F.2d 179, 181 n. 6 (11th Cir. 1987).

A. Evidence of a Prima Facie Case

As noted above, in order to establish a prima facie case a complainant must establish: (1) that he or she engaged in protected activity, (2) that the respondent knew of the protected activity, (3) that the respondent took adverse action against him or her, and (4) an inference that the protected activity was a likely reason for the adverse action. For the reasons set forth below, I find that in this case the Complainant has satisfied each of these requirements.

1. Participation in Protected Activity

There are three distinct types of protected activities under the provisions of the STAA: (1) safety-related complaints (either internal or external), (2) refusals to operate a vehicle when the operation of the vehicle would in fact violate Federal safety standards, and (3) refusals to operate a vehicle if (a) an employee

has a "reasonable apprehension of serious injury to himself or the public" because of the unsafe condition of the vehicle and (b) the employee has unsuccessfully attempted to have his employer correct the unsafe condition. 49 C.F.R. §31105(a)(1).

In this case, the evidence indicates that the Complainant made several complaints to Carol Guddat about being given overweight shipments and about the number of hours he had been driving for Conex.[7] As well, the record also indicates that the Complainant made internal safety-related complaints concerning the mechanical condition of his truck. All of these complaints clearly constitute protected activities. See Doyle v. Rich Transport, Inc., 93-STA-17 (April 1, 1994). Hence, the Complainant has met the first requirement for establishing a prima facie case.[8]

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[7] The provisions of the Department of Transportation's Motor Carrier Safety Regulations, 49 C.F.R. §§390-99, do not contain any maximum weight limitations. However, the provisions of 23 U.S.C. §127 generally prohibit the operation of vehicles having a gross weight of more than 80,000 pounds on interstate highways. It is assumed that this provision was designed to both protect the highways from damage attributable to overloaded vehicles and promote safety. Accordingly, I find that complaints about overweight vehicles are a type of activity protected under the provisions of the STAA. See Galvin v. Munson Transportation, Inc., 91-STA-41 (August 31, 1992) (decision assuming that a refusal to drive an overweight vehicle is a protected activity under the STAA).

[8] In this regard it is noted that the Complainant's refusal to transport allegedly overweight containers could also qualify as a protected activity if the transportation of such containers would have violated Federal safety standards or created a "reasonable apprehension of serious injury." However, in this case the Complainant has provided little convincing evidence to show that any container he refused to haul was actually overweight. In fact, the only evidence concerning the weight of such containers is the Complainant's assertion that two specific containers given to him by Conex had later been found to be overweight and his impression that approximately 75 percent of the containers he picked up at the Conex terminal were overweight. I find that such evidence, by itself, is not sufficient to establish a violation of Federal safety standards or to show that there was a "reasonable apprehension of serious injury." Indeed, under the rules of evidence applicable to this proceeding and to proceedings in the Federal courts, such evidence ordinarily would not even be admissible for the purpose of proving that containers that the Complainant refused were in fact overloaded. See 29 C.F.R. §18.404(b) (rule of evidence precluding the admission of evidence of past "crimes, wrongs or acts" by a person in order to prove the person's character and thereby circumstantially establish that the

2. Respondent's Knowledge of the Protected Activity

It is well established that before any respondent can be held liable for taking an adverse action against an employee, the employee must show that at the time of the adverse action the respondent was aware that the employee had engaged in some sort of protected activity. Greathouse v. Greyhound Lines, Inc., 92-STA-18 (Dec 15, 1992). In this case, the evidence shows that Carol Guddat was aware of the Complainant's various safety-related complaints as well as the Complainant's refusal to transport allegedly overweight containers. Hence, the Complainant has also satisfied the second requirement for establishing a prima facie case.

3. Adverse Action

The third element of a prima facie case is proof of an adverse action against a complainant. In this regard, the evidence indicates that Carol Guddat in effect "fired" the Complainant when he retrieved Guardian's truck from Harbor Island. Accordingly, I find that the Complainant has established the third element of a prima facie case.

4. Inference that a Protected Activity was a Likely Reason for the Adverse Action.

In order to establish the final element of a prima facie case, a complainant must show that the evidence is sufficient to support an inference that the protected activity was the likely reason for the adverse action. Among other things, proximity in time between the protected activity and the adverse action can support such an inference. See Moravec v. HC & M Transportation, Inc., 90-STA-44 (Jan. 6, 1992). In this case, the evidence shows that the Complainant's protected activities occurred within a few months prior to his termination by Guardian. Accordingly, there is enough evidence to support an inference that there was a causal relationship between the Complainant's protected activity and the adverse action against him. Thus, the Complainant has established all four elements of a prima facie case.

B. Evidence of Lawful Motives

Since all of the prerequisites of a prima facie case have been established, Guardian has the burden of producing evidence that the adverse action against the Complainant was based on lawful motives. However, this burden can be met by merely introducing evidence which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the

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person committed a similar alleged crime, wrong or act). See also Robinson v. Duff Truck Line, Inc., 86-STA-3 (March 6, 1987); Brame v. Consolidated Freightways, 90-STA-20 (June 17, 1990).

employment action, even if such evidence is not ultimately credited by the finder of fact. St. Mary's Honor Center v. Hicks, ____U.S.____, 113 S.Ct. 2742 (1993); Anderson v. Jonick & Co., Inc., 93-STA-6 (September 29, 1993). If such evidence is introduced, the presumption of discrimination created by the prima facie case is rebutted and the overall burden of proving illegal discrimination by a preponderance of the evidence remains on the complainant. Id.

In this case, the Respondent has offered evidence indicating that the adverse action against the Complainant was the result of the Complainant's refusal to continue driving until such time as he received payments which he believed to be overdue. In particular, Carol Guddat testified that he retrieved Guardian's truck from Harbor Island because the Complainant had explicitly threatened to stop driving and then left the truck sitting idle when it should have been in service. Moreover, the Complainant in effect admitted that essentially this same explanation was given to him by Mr. Guddat when he allegedly spoke to Mr. Guddat after finding that the truck was gone. In view of this evidence, I find that the presumption created by the Complainant's prima facie case has been rebutted and that the burden of proving illegal discrimination still remains on the Complainant. Accordingly, it is necessary to weigh all of the relevant evidence in order to determine whether the termination of the Complainant's employment did in fact violate the STAA.

C. Conclusions

On balance, the Complainant has not shown by a preponderance of the evidence that his termination was even partially motivated by a desire to punish him for his protected activities. There are several reasons for this conclusion.

First, although it is clear that the Complainant did make some complaints about overweight containers and other safety-related matters and that these complaints might have indirectly had some adverse impact on Guardian's revenues (e.g., caused the loss of some revenue from Conex), the evidence does not indicate that Carol Guddat was particularly hostile to such complaints. For example, the evidence shows that when the Complainant made complaints about overweight containers Mr. Guddat merely reminded the Complainant that under his contract with Guardian compliance with safety requirements was his own responsibility and that he had to decide for himself whether to haul containers that he suspected of being overweight. Likewise, the record shows that even after the Complainant was precluded from hauling shipments for Conex, Carol Guddat chose to suggest another source of work for the Complainant, rather than simply terminating Guardian's contract with the Complainant on the grounds that there was a lack of work.

Second, the evidence indicates that Guardian had legitimate reasons for being dissatisfied with the Complainant's performance. For instance, as previously noted, the record shows that after being "fired" at Conex the Complainant inexplicably let Guardian's truck sit idle for almost a whole week before informing Guardian that he needed another source of shipments. Similarly, the Complainant's refusal to drive substitute trucks while his assigned truck was being serviced also suggests that the Complainant was not strongly motivated to work.

Finally, and most importantly, it appears more likely than not that Carol Guddat sincerely believed that the Complainant was unjustifiably refusing to haul shipments for Seattle Freight because of the delays in receiving payment for such work. Although the Complainant has disputed Carol Guddat's testimony that the Complainant said he would stop hauling for Seattle Freight until he received the allegedly overdue payments, Mr. Guddat's testimony on this and related issues is more credible. In this regard, it is noted that the Complainant admits that he told Carol Guddat that he couldn't be expected to keep driving if he wasn't going to be paid and that the Friday he stopped hauling shipments for Seattle Freight was "maybe" the second Friday he had failed to receive an expected payment. As well, the evidence also indicates that the Complainant was likely to have been particularly upset by the perceived delays because he mistakenly thought that he was entitled to be paid weekly even though his contract with Guardian clearly provided that he would not be paid until Guardian received payment from Seattle Freight. Moreover, although there is a conflict in the evidence concerning the exact days the Complainant failed to haul any shipments for Seattle Freight, it is clear that at some point in time the Complainant did in fact temporarily stop hauling such shipments and thereby gave Guardian reason to believe that he was refusing to work until he received the allegedly overdue payments.

## RECOMMENDED ORDER

For the reasons set forth above, it is recommended that the complaint of Gale W. Cook against Guardian Lubricants, Inc., under Section 405 of the Surface Transportation Assistance Act be dismissed.

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Paul A. Mapes
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the related administrative file is herewith being forwarded to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309,

Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C., 20210. The Office of Administrative Appeals has responsibility for advising and assisting the Secretary of Labor in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations set forth at 29 C.F.R. § Parts 24 and 1978. Pursuant to the provisions of 29 C.F.R. §1978.109(c)(2) the parties may file briefs with the Office of Administrative Appeals supporting or opposing this Recommended Decision and Order within 30 days of its issuance, unless the Secretary establishes a different briefing schedule.

TEL (415) 744-6577
FAX (415) 744-6569

DATE: November 21, 1995
CASE NUMBER 95-STA-43

In the Matter of

GALE COOK,
COMPLAINANT,

v.

GUARDIAN LUBRICANTS, INC.,
RESPONDENT.

NOTICE OF SUPPLEMENTAL HEARING

All parties are hereby notified that the Supplemental Hearing which had been scheduled for November 20, 1995, is hereby rescheduled to commence at 10:30 a.m. on Monday, December 4, 1995. The hearing will be held in Room 2866 in the Federal Building at 915 Second Avenue in Seattle, Washington.

_____
Paul A. Mapes
Administrative Law Judge

Date:
San Francisco, California

TEL (415) 744-6577
FAX (415) 744-6569

DATE: November 8, 1995
CASE NUMBER 95-STA-43

In the Matter of

GALE COOK,
COMPLAINANT,

v.

GUARDIAN LUBRICANTS, INC.,
RESPONDENT.

NOTICE OF SUPPLEMENTAL HEARING

A hearing in the above-captioned matter was held in Seattle, Washington, on October 17, 1995. The Complainant appeared pro se and Guardian Lubricants, Inc., was represented by Jeff Guddat, the company's general manager. During the hearing Mr. Guddat indicated that he has no personal knowledge of the facts in dispute and that the only person at Guardian Lubricants who does have such knowledge is his father, Carol Guddat. He further indicated that Carol Guddat had been on an out-of-state vacation when the original hearing notice was issued and had not yet returned to Seattle.

In view of the fact that Guardian Lubricants was not represented by an attorney and therefore apparently did not realize that it would have been entitled to a continuance until Carol Guddat returned from his vacation, I have determined that the record should be re-opened so that a supplemental hearing can be held for the purpose of receiving the testimony of Carol Guddat, as well as any rebuttal testimony the Complainant may wish to offer.

The supplemental hearing will commence at 10:30 a.m. on Monday, November 20, 1995, in Room 2866 of the Federal Building at 915 Second Avenue in Seattle, Washington.

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Paul A. Mapes
Administrative Law Judge

Date:
San Francisco, California